IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	Case No. 2009-1619
	:	
v.	:	
	:	
Denny Ross,	:	
	:	
Defendant-Appellee.	:	

MERIT BRIEF OF AMICUS CURIAE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE, DENNY ROSS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender is a state agency charged with the duty to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The Ohio Public Defender has an enduring interest in protecting the integrity of the justice system, and a special role in ensuring that the development and application of the criminal law is in accordance with the rights of Ohio's citizens. This Court has recognized this special role of the Ohio Public Defender as it relates to criminal appeals by the state, and has required that "[i]n a case involving a felony, when a county prosecutor files a notice of appeal under S. Ct. Prac. R. II or an order certifying a conflict under S. Ct. Prac. R. IV, the county prosecutor shall also serve a copy of the notice or order on the Ohio Public Defender." S. Ct. Prac. R. XIV, Sec. 2(A).

This case presents an important question regarding the ability of a trial court to reconsider its decision denying an acquittal motion, when no guilty verdicts were reached by the jury. The Ohio Public Defender and the clients it serves will be directly affected by any action taken by the Court in this case. Moreover, the Office of the Ohio Public Defender is able to provide an important perspective on the issues that will not otherwise be presented to this Court. Accordingly, the Office of the Ohio Public Defender offers this amicus curiae brief in support of the appellee in this case.

STATEMENT OF THE CASE AND THE FACTS

The parties, and the opinion of the court of appeals, have adequately set forth the procedural and factual history of this case.

ARGUMENT

Proposition of Law of Amicus Curiae:

Denial of a motion for acquittal is not a final appealable order, and before final judgment is entered the trial court may reconsider its decision denying the motion.

Both the State and amicus curiae Ohio Prosecuting Attorneys Association claim to be concerned about finality in criminal cases. But the ruling that they complain of is the very one that brought finality to Denny Ross' case. Without that ruling—which effectively gave voice to the 12 jurors who had signed the verdict forms that would have acquitted Mr. Ross—there would have been no finality until another full trial had been conducted. The government's concern here is not finality. The State and the OPAA simply disagree with the trial court's decision to re-visit its interlocutory decision on the acquittal motion, and that court's ruling that the evidence was insufficient for any rational finder of fact to convict Mr. Ross.

The authorities principally relied on by the State and by amicus curiae the Ohio Prosecuting Attorneys Association, *Carlisle v. United States* (1996), 517 U.S. 416, and its progeny, do not involve the scenario presented here. First, *Carlisle* did not arise from the reconsideration of an acquittal motion. Rather, it involved an untimely-filed acquittal motion; the motion filed by Mr. Ross was timely, so *Carlisle* does not control. But second, and even more importantly, *Carlisle* and the cases cited by the State and the OPAA that follow *Carlisle*, all involve the setting aside of *guilty* verdicts that had been reached by juries. Here, the jurors had signed verdicts acquitting Mr. Ross.

This distinction is critical, as the second sentence of Crim. R. 29(C) permits the trial court to set aside guilty verdicts only on the motion of the defendant: "If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal." But the

third sentence of Crim. R. 29(C) establishes that if there is no guilty verdict, no motion is required: "If no verdict is returned, the court may enter judgment of acquittal." Justice Scalia's majority opinion in *Carlisle* noted this critical distinction—which has been ignored here by the State and by the OPAA—and rejected the government's claim in that case that even if there had been no guilty verdicts against Mr. Carlisle, the trial court's ruling granting the untimely acquittal motion would still have run afoul of Fed. Crim. R. 29. *Carlisle v. United States*, 517 U.S. at 423 and fn. 3. Here, there were no guilty verdicts reached, thus the trial court never lost jurisdiction to enter judgment of acquittal, pursuant to the plain language of the third sentence of Crim. R. 29 and the juxtaposition of the second and third sentences therein.

Further, the trial court's initial decision to deny Mr. Ross' acquittal motion was in fact a mere interlocutory order, subject to reconsideration, and nothing in Crim. R. 29(C) or Crim. R. 45(B) bars a trial court from reconsidering a denial of a timely motion to acquit. While this Court established in *State ex rel. Hansen v. Reed* (1992), 63 Ohio St. 3d 597, 599, that a trial court cannot reconsider its own final judgment in a criminal case, when there is no final judgment a court "possesse[s] authority to review and reverse its previous decision." *State ex rel. White v. Junkin* (1997), 80 Ohio St. 3d 335, 338. As defendants cannot appeal from the denial of an acquittal motion, and the state would never have reason to, there is no colorable argument to be made that such a ruling is a "final judgment." Thus, the trial court may "review and reverse" such a decision.

Because the trial court had authority to reconsider the denial of the acquittal motion, it then becomes necessary to assess whether that court's decision to revisit the acquittal motion could conceivably be construed to be an abuse of discretion. *State ex rel. Miller v. Brady*, 123 Ohio St. 3d 255, 258, 2009-Ohio-4942, ¶13 ("[a] trial court's decision whether to reconsider a

previous interlocutory order is a matter of discretion and will not be reversed on appeal absent an abuse of that discretion"). The trial court's ultimate ruling effectuated the acquittal verdicts signed by the jurors who served during Mr. Ross' trial. Therefore, it is difficult to see how the trial court's correction of its course with respect to the acquittal motion could even constitute error, let alone an abuse of discretion.

In contrast to the interlocutory nature of the denial of an acquittal motion, when a trial court *grants* such a motion, that ruling constitutes a "final verdict." *State v. Keeton* (1985), 18 Ohio St. 3d 379. This distinction is crucial, because the state's right to appeal in criminal cases is both established and delineated in R.C. 2945.67. The statute grants the state a right to appeal four specific judgments: the grant of a motion to dismiss a charging instrument, a motion to suppress evidence, a motion for the return of seized property, or a motion for postconviction relief. R.C. 2945.67(A). The statute also provides that the state "may appeal *by leave of the court* to which the appeal is taken any other decision, *except the final verdict*, of the trial court in a criminal case . . . ." Id. (emphasis added).

Simply put, the state may not "prosecute error in a criminal matter" unless the right to appeal is provided by statute. *State ex rel. Leis v. Kraft* (1984), 10 Ohio St.3d 34, 35. And because a judgment of acquittal subsequent to a defendant's Crim. R. 29 motion is a "final verdict," this Court has concluded that such judgments are not appealable by the state. *State ex rel. Yates v. Court of Appeals* (1987), 32 Ohio St.3d 30, syllabus. Thus, the State could not directly appeal the trial court's December 22, 2003, ruling in favor of Mr. Ross. The State's current challenge to the trial court's reconsideration of Mr. Ross' acquittal motion is an attempt to accomplish indirectly that which could not be done through a direct appellate attack on the

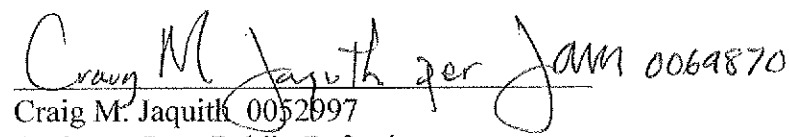
trial court's final ruling. Because the trial court had jurisdiction to reconsider its own non-final judgment, this rear-guard action by the State should be rejected.

Conclusion

This Court should affirm the court of appeals because the trial court's December 22, 2003, entry granting Mr. Ross' acquittal motion was within the court's jurisdiction, and was not in error. Alternatively, the State's appeal should be dismissed as improvidently allowed, as the controlling portion of Crim. R. 29(C) was not explicitly addressed by the State either in its jurisdictional memorandum or in its brief.

Respectfully submitted,

Office of the Ohio Public Defender



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Certificate of Service

I certify that on June 2, 2010, the foregoing Brief of Amicus Curiae Ohio Public Defender in Support of Appellee, Denny Ross was served via regular U.S. mail on Matthew E. Meyer, Special Prosecutor for Summit County, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113; Thomas L. Sartini, Ashtabula County Prosecutor, Office of the Ashtabula County Prosecutor, 25 W. Jefferson Street, Jefferson, Ohio 44047; Lawrence J. Whitney, Esq., 137 South Main Street, Suite 201, Akron, Ohio 44308 and Billie Jo Belcher, Assistant Prosecutor, Lorain County, Office of the Lorain County Prosecutor, 225 Court Street, 3rd Floor, Elyria, Ohio 44035.

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